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FILED

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SECRETARY, BOARD OF
OIL, GAS & MINING

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondents, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH Respondent/Intervenors.	RESPONDENT ALTON COAL DEVELOPMENT, LLC'S PRE-HEARING BRIEF REGARDING PETITIONERS' HYDROLOGY AND GEOLOGY CLAIMS Docket No. 2009-019 Cause No. C/025/0005
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Alton Coal Development, LLC ("Alton" or "ACD"), the permittee of Mine Permit No. C/025/0005 ("Permit"), through its attorneys submits its pre-hearing memorandum of legal issues and authorities addressing the legal standards for resolving the remaining geology/hydrology claims raised by petitioners Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Park Conservation

Association (collectively, “**Petitioners**”) in their Request for Agency Action, filed with the Board of Oil, Gas and Mining (“**Board**”) on November 18, 2009 as restated in Petitioners’ List of Geology/Hydrology Issues for Hearing attached to the Board’s Scheduling Order in this matter.

This ¹memorandum presents the applicable rule of law and legal authority regarding Petitioners’ four remaining geology/hydrology challenges to Alton’s mine permit to be considered at the Hearing on May 21-22, 2010. For each issue, Alton identifies the rule applicable to the Board’s decision, when one exists, for the issue as Petitioners have framed it. When important interpretive authority exists, either in statute, rule, or guideline, Alton set forth that information as well. Also, for each issue, Alton identifies the Division’s relevant finding or technical conclusion and outlines the evidence which Alton will offer at hearing.

ARGUMENT

1. **Issue 14: Whether ACD’s geologic information is unlawfully incomplete because ACD failed to drill deeply enough to identify the first aquifer below the Smirl coal seam that may be adversely affected by mining.**

FINDING: The Division appropriately found in its required Technical Analysis that the Geologic Resources information in the permit application was adequate under the applicable rules and statutes. Final Technical Analysis 55 (October 19, 2009). The Division determined that the first aquifer below the coal seam was the Navajo Aquifer, which was unlikely to be affected owing to its depth and isolation from the proposed mining. *Id.* at 62.

LEGAL STANDARD: The Utah Coal Mining and Reclamation Act (“UCMRA”) requires that the applicant provide “chemical analyses of the stratum lying immediately underneath the coal to be mined.” Utah Code § 40-10-10(2)(d)(i)(F) (LexisNexis 2009). The rules require samples to be collected and analyzed from the deeper of either “the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam which may be adversely

¹ Two hydrology issues relating to the Cumulative Hydrologic Impact Analysis were scheduled for hearing on April 29-30, 2010, but remain to be heard. Alton identified the relevant legal issues for these two claims in its memorandum filed April 26, 2010.

affected by mining.” Utah Admin. Code R645-301-624.200 (2009). The Division is authorized to waive this sampling and analysis requirement. R645-301-626.

At the hearing, Petitioners will have the burden of showing that some necessary sampling and analysis of strata below the coal seam was omitted. Alton, for its part, will offer the expert testimony of Erik Peterson, its geology and hydrology consultant, who will describe and identify the relevant drilling information and chemical analyses.

2. **Issue 15: Whether ACD’s hydrologic monitoring plans are unlawfully incomplete because they fail to establish monitoring stations:**

(a) for surface water on Lower Robinson Creek immediately upgradient of the permit area; and

(b) for both surface and alluvial ground water in or adjacent to Lower Robinson Creek, immediately downgradient of the most downgradient discharge point from the seeps or springs that ACD and the Division have observed between monitoring points SW-101 and SW-5.

FINDING: The Division found in its required Technical Analysis that the Hydrologic Resources information in the permit application, including monitoring plans, was adequate under the applicable rules and statutes subject to resolution of certain clear and concise housekeeping or clerical issues. Final Technical Analysis 76–77 (October 19, 2009).

LEGAL STANDARD: The rules for hydrologic monitoring plans require surface and groundwater monitoring locations to be identified in the permit application, but provide no specific criteria for choosing the locations. See R645-301-731-211 (groundwater); 645-301-731.222 (surface water). Surface-water hydrologic monitoring plans are to be based on the probable hydrologic consequences determination and the baseline monitoring data. R645-301-731.221.

At the hearing, Petitioners will have the burden of demonstrating that the monitoring plan falls short of some rule or statute of the Utah Coal Program as a result of Alton’s selection of monitoring sites on Lower Robinson Creek. Petitioners cannot prevail on this issue merely by

offering evidence that another hydrologist would have selected different locations for this surface water resource. Alton will offer the expert testimony of Mr. Peterson, who will identify monitoring locations for Lower Range Creek, explain why he recommended the locations selected by ACD and discuss the data to be collected from each location.

3. **Issue 16: Whether ACD's baseline hydrologic data are unlawfully incomplete in one or more of the following respects:**

(a) the data do not include even one flow rate or water quality entry during the data collection period at monitoring stations that ACD should have established on Lower Robinson Creek immediately upgradient of the permit area, and thus the data do not demonstrate seasonal variation at that location;

(b) the data do not include even one flow rate or water quality entry during the data collection period at a monitoring station that ACD should have established on Lower Robinson Creek immediately downgradient of the most downgradient discharge point from seeps and springs that ACD and the Division have observed between monitoring points SW-101 and SW-5, and thus the data do not demonstrate seasonal variation at that location; and

(c) none of the water quality data are verified by complete laboratory reports that establish an appropriate chain of custody and identify the sampling protocols that governed collection of each water sample.

FINDING: The Division found in its required Technical Analysis that the Hydrologic Resources information in the permit application, including monitoring plans, was adequate under the applicable rules and statutes subject to resolution of certain clear and concise housekeeping or clerical issues. Final Technical Analysis 76–77 (October 19, 2009).

LEGAL STANDARD: A permit application must contain a “determination of the quantity and quality of water in surface and groundwater systems, including the dissolved and suspended solids under seasonal flow conditions.” Utah Code § 40-10-10(2)(c)(i)(B). The rules for collection of baseline hydrologic data for surface water require specific quantity measurements and chemical analyses, in an amount sufficient to demonstrate “seasonal variation.” R645-301-724.200. The rule for baseline groundwater information is similar, requiring collection of information on “seasonal quality and quantity.” R645-301-724.100. Neither rule provides any specific criteria for choosing the locations where the baseline data will be collected. Both the

Division and the Office of Surface Mining have issued guidance to prospective permit applicants regarding the collection of baseline hydrologic data. In each case, the guidance document emphasizes that its contents have not been adopted in a formal rulemaking and is not binding on applicants. Further, these documents clarify that they are intended only as a guide to applicants for collecting baseline data, rather than as a guide to the regulatory authority in evaluating permit applications.

The rules for water sampling and analysis require that chemical analyses shall be conducted according to standard procedures published by either the Environmental Protection Agency or the American Water Works Association. R645-301-723. The same rule requires that sampling should be conducted according to either of these methods “when feasible.” Id. There is no requirement to observe chain of custody procedures. Likewise, there is no requirement to include laboratory reports, sampling protocols, or chain of custody information in the permit application.

At the hearing, Petitioners will have the burden of proving that the baseline data collected on Lower Robinson Creek are insufficient to allow description of seasonal variation in water quality or quantity. It is insufficient to produce evidence that another suite of data collection times, methods, and locations might have produced a different, or even more detailed, description of the resource. Petitioners must also prove that Alton’s methods fell short of the legal standard identified above.

For Issue 16(c) dealing with sampling and analytical methods, Petitioners must prove that the methods employed by the analytical laboratory deviated from either of the two published standards. For sampling methods, Petitioners must prove, by a preponderance of the evidence, not only that Alton’s sampling methods fell short of the published standards, but that sampling

according to the standards was feasible under the circumstances. For its part, Alton will present documentary evidence of the analytical methods employed, together with Mr. Peterson's testimony describing sample collection and handling procedures.

4. **Issue 17: Whether the Division's determination that Sink Valley does not contain an alluvial valley floor is arbitrary, capricious, or otherwise inconsistent with applicable law.**

FINDING: The Division made a determination that "the definition that defines an alluvial valley floor in Sink Valley is not met." Final Technical Analysis 31 (October 19, 2009). The determination was supported by its findings that "[t]he defining geologic characteristics are not present for an alluvial valley floor within or adjacent to the permit area." *Id.* at 51. The Division concurred with Alton that Sink Valley in the area of the mine consists of uplands located outside the floodplain and terrace complex, finding, "The Upper Sink Valley Wash, where the mine is proposed, consists of alluvial fan deposits, with no floodplain and terrace complex." *Id.* at 51.

LEGAL STANDARD: If mining is proposed "within a valley holding a stream or in a location where the adjacent area includes any stream" the applicant must provide a field investigation from which the Division can determine the existence of an alluvial valley floor ("AVF"). R645-302-321.100. The Division shall find that an AVF is present in the valley floor if the floor consists of unconsolidated stream-laid deposits and sufficient water is present from the stream to support agriculture. R645-302-321.300-321.323.

"Alluvial valley floor" is defined in identical language in SMCRA, UCMRA, and the Board's rules:

"Alluvial valley floors" means the unconsolidated stream-laid deposits holding streams with water availability sufficient for subirrigation or flood irrigation agricultural activities, but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits formed by unconcentrated runoff or slope wash, together with talus, or other mass-movement accumulations, and windblown deposits.

30 U.S.C. § 1291(1) (2006); Utah Code § 40-10-3(2); Utah Admin. Code R645-100-200.

Upland areas, which by definition cannot be alluvial valley floors, are defined by the Utah rules as follows:

“Upland areas” means, with respect to ALLUVIAL VALLEY FLOORS, those geomorphic features located outside the floodplain and terrace complex such as isolated higher terraces, alluvial fans, pediment surfaces, landslide deposits, and surfaces covered with residuum, mud flows, or debris flows, as well as highland areas underlain by bedrock and covered by residual weathered material or debris deposited by sheetwash, rillwash, or windblown material.


R645-100-200.

Because the determination of an AVF’s existence is, to say the least, a matter where the Division applied considerable technical judgment, deference by the Board to the Division’s technical findings is appropriate. Therefore, at the hearing, Petitioners will have the burden of proving that the decision was arbitrary and capricious, which requires a showing that the Division’s decision exceeded the bounds of reasonableness and rationality. Alton will provide the expert testimony of Mr. Peterson, who will describe his field investigation of the Sink Valley area and his conclusions that the defining characteristics are not present for an AVF within or adjacent to the permit area.

CONCLUSION

For each issue to be raised by Petitioners at the May 21-22, 2010 Hearing, Alton has identified the legal authority and rule of law necessary to determine the merits of the claim. Alton respectfully requests that based on these legal standards the Board affirm the Division’s decision to approve the permit for the Coal Hollow Mine and dismiss Petitioners’ claims regarding geology and hydrology.

SUBMITTED this 19th day of May, 2010.



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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 2010, I e-mailed a true and correct pdf copy of the foregoing **RESPONDENT ALTON COAL DEVELOPMENT, LLC'S PRE-HEARING BRIEF REGARDING PETITIONERS' HYDROLOGY AND GEOLOGY CLAIMS** to the following:

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